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No. 91-1721

In The

Supreme Court of the United States

October Term, 1992

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether an association must show that its members actually would have received one or more of those contracts absent the ordinance?

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ARGUMENT

This Court granted review of the question of what type of injury an association must allege to have standing to challenge a racially discriminatory ordinance. Respondents would have this Court instead decide what evidence an association must enter into the record to support its verified, uncontested pleadings on an issue that is raised for the first time on appeal. Under either analysis, the ruling of the Court of Appeals for the Eleventh Circuit should be reversed.

As AGC demonstrated in its brief on the merits, its complaint should be judged by the standards appropriate for pleadings. The complaint alleged that the City of Jacksonville excluded non-minority AGC members from the bidding process for certain contracts the City awarded, and that the City based such exclusions on unconstitutional racial classifications. Those allegations establish the requisite injury-in-fact for standing under the equal protection clause.

I. Unequal Treatment in Consideration for Government Contracts Is Sufficient Injury to Establish Standing.

As Petitioner's initial brief demonstrates, the constitutional right at issue in this case, equal protection of the laws, protects simply the right to compete on an equal footing for government contracts. It does not guarantee any substantive right to those contracts, and does not concern itself with the final results of a fair bidding process.

Respondents do not refute, or even address, the argument that the only injury required for standing under the equal protection clause is discriminatory exclusion from the bidding process. *Cf., Heckler v. Mathews*, 465 U.S. 728 (1984). They present no case law justifying the Eleventh Circuit's "specific lost contract" rule. Even their supporting *amici curiae* do not defend the appellate court's decision. Brief of the States of Ohio and Michigan, pp. 11-12; Brief of National League of Cities, et al., p. 19.

Respondents' only defense of the Eleventh Circuit rule is that AGC's complaint somehow "compelled" the court to adopt it. Brief of Respondents at 22-23. Such a claim is somewhat disingenuous in light of the fact that the Eleventh Circuit adopted its "specific lost contract" standard long before it ever saw AGC's complaint. *S.J. Groves & Sons Co. v. Fulton Co.*, 920 F.2d 752 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274 (1991); *Cone Corp. v. Florida Dept. of Transp.*, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991).

In any event, any intermittent references in AGC's complaint to economic injury could not have forced the Eleventh Circuit to adopt its rule. AGC made clear that its claim was based on the equal protection clause, Complaint, ¶ 55; R-1-1, Joint Appendix at JA-20, and that AGC members were precluded from bidding on City contracts. *Id.*, ¶¶ 9, 45, 50; JA-10, 18, 19. Courts must construe pleadings "so as to do substantial justice," Fed. R. Civ. P. 8(f), and long have considered themselves free to disregard surplus language in complaints. *See, e.g., E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 459 (1924); *Bishop & Co. v. Midland Bank*, 84 F.2d 585 (9th Cir.), *cert. denied*, 299 U.S. 587 (1936). The question is not whether the

complaint says too much, but whether it alleges all that it must.

That latter question is the crux of Respondents' brief. They silently concede the error of the Eleventh Circuit's requirement of economic injury, spending most of their brief attacking the sufficiency of AGC's complaint. That argument, too, must fail, because AGC's allegations sufficiently establish the discrimination that its members suffered.

II. Petitioner's Complaint Contains Sufficient Allegations of Immediate, Particularized Injury to Establish Standing.

Respondents argue that AGC's complaint did not establish specific injury because it did not demonstrate that AGC members were affected by the City's ordinance. To the extent that Respondents would demand proof of a specific lost contract, AGC agrees that its complaint contains no such allegations. That issue, after all, is the question that this Court originally agreed to review. To the extent, however, that Respondents contend AGC failed to establish specific, direct, and immediate discrimination against its members, they are wrong.

A. AGC's Complaint Satisfies the Standard for Construing Pleadings.

Respondents confuse the appropriate standards to be applied in this case, claiming that AGC failed to produce

evidence at the summary judgment stage.[1] Brief of Respondents, pp. 26-29. However, Respondents blithely ignore the fact that they never contested AGC's standing during that time. Respondents never raised the issue in their motion for summary judgment, R-2-33. They did not file any motions on the issue during the weeks between the Eleventh Circuit's mandate and the district court's order granting summary judgment to AGC. District Court Docket Sheet, Joint Appendix at JA-5. Nor did the record of proceedings of the pre-trial conference contain any reference to the issue of standing. R-1-61.

Given Respondents' delayed request for more evidence and the unusual posture of this case, AGC's complaint should be held to the standards appropriate for pleading, not summary judgment. Thus, this Court should "accept as true material allegations of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979). AGC's complaint and the evidence in the record meet all Article III requirements for standing.

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[1] Respondents misconstrue Petitioner's brief on the merits, claiming that AGC concedes that the district court erred in granting summary judgment to AGC when it had no evidence to establish its standing. Brief of Respondents, pp. 26, 29. AGC never made such a concession. AGC simply agreed that *if* the Eleventh Circuit was correct in requiring evidence of a specific lost contract, the record contained no such evidence. Brief of Petitioner, pp. 28-31. If, however, the requisite injury is unequal treatment in the bidding process, AGC's complaint is sufficient to establish standing and the district court's decision was correct.

B. AGC's Complaint Establishes Actual Exclusion of AGC Members from the City's Bidding Process.

Respondents are entirely correct that AGC must allege a concrete, particularized injury, *Warth v. Seldin*, 422 U.S. 490, 508 (1975), that is actual and imminent, *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992), causally connected to the challenged ordinance, and redressable by a favorable decision. *Id.*; *Allen v. Wright*, 468 U.S. 737 (1984). AGC's complaint establishes all of these facts.

First, AGC alleged that the City's MBE program[2] set aside 10% of capital improvement funds for minority business enterprises. Complaint, ¶ 19; R-1-1; Joint Appendix at JA-12. Respondents admitted this allegation. Answer, ¶ 19, JA-27. The ordinance also established a 10% set-aside for all non-capital contracts. City of Jacksonville Purchasing Code § 126.605 (1988); R-1-5; Petition Appendix at App. 18. Projects that the City determined to be part of the set-aside were "deemed reserved for minority business enterprises only," and the projects or contracts were to be "awarded directly to minority

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[2] Respondents and their supporting *amici curiae* argue that this case is moot because the City enacted a new ordinance in October, 1992. This Court has already considered those arguments, and on December 14, 1992, denied Respondents' Motion to Dismiss as Moot.

Because the case is not moot, the proper statute to consider is the ordinance that AGC originally challenged. In any event, as AGC demonstrated in its response to the Motion to Dismiss as Moot, the two statutes are identical for purposes of standing.

business enterprises." *Id.*, §§ 126.604(c), 126.605(c); App. 18, 21.

AGC's complaint also established that its members were actually and concretely affected by these direct awards to minority businesses. AGC's members "regularly bid on and perform construction work for the City of Jacksonville." Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10. AGC's non-minority members "are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville." *Id.* Furthermore, "[n]umerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set-aside contracts but for the restrictions imposed on such contracts by the Defendants." *Id.*, ¶ 46; JA-18.

These allegations establish that AGC members, who regularly bid on work for the City of Jacksonville, were excluded from consideration for set-aside projects and contracts. In this respect, Petitioner's complaint is indistinguishable from that in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). In that challenge to a rent control ordinance, the appellees argued that the injury the individual landlord and landlord's association claimed was too speculative to confer standing. *Id.*, 485 U.S. at 6-7. They pointed out that the association had not identified any member with tenants who might trigger the ordinance, or any adverse determination that would cost money. *Id.*, 485 U.S. at 6.

This Court nevertheless found the landlords' allegations to be sufficient to establish standing:

> Here, appellants specifically alleged in their complaint that appellants' properties are

> "subject to the terms of" the Ordinance, and they stated *at oral argument* that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants."

Id., 485 U.S. at 7 (emphasis added). Accordingly,

> [t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is sufficient threat of actual injury to satisfy [Article III].

Id., 485 U.S. at 8.

AGC's complaint provides much more information than the complaint that this Court found adequate in *Pennell*. Just as in that case, AGC alleged that its members are subject to Respondents' set-aside ordinance. As contractors and businesses that "regularly bid on and perform construction work for the City of Jacksonville," Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10, AGC members clearly are subject to an ordinance that governs construction contracts.

Indeed, both the district court and the Respondents found AGC's allegations to be sufficient until the second trip to the appellate court. Respondents never challenged AGC's standing until after the Eleventh Circuit announced its new "economic injury" rule. Even in that appeal, their argument was that AGC lacked proof of economic injury, not that its allegations were insufficient to show actual discrimination. Initial Brief of Appellants at 26 (11th Cir. No. 90-3495). Respondents should not be permitted to argue that AGC failed to produce evidence

that neither they nor the district court considered relevant until long after the record was closed.

Respondents are ambiguous about what further evidence AGC should have ~~produce~~d in the district court. They appear to believe that the only acceptable proof of an actual injury would be a particular contract for which an eligible AGC member was not permitted to bid. Respondents' Brief at p. 13. That is a new argument in this case. At first glance, it appears to be a step short of the Eleventh Circuit's requirement that AGC must also show that the member was the low bidder but lost the contract because of the ordinance. Respondents' new rule, however, would merely require economic injury in another form.

The City of Jacksonville ordinance specifies that set-aside projects and contracts are "deemed reserved for minority business enterprises only," and are to be "awarded directly to minority business enterprises." City of Jacksonville Purchasing Code §§ 126.604(c), 126.605(c); Petition Appendix at App. 18, 21. To meet Respondents' standard, then, a non-minority AGC member would have to prepare a bid that, by law, the City could not accept or even consider.

Preparing a construction bid involves much more than signing a few sheets of paper. A contractor must review the bid specifications to determine what supplies and workmanship he or she would require to perform the project. Evaluation of some projects requires outside experts, such as geologists or engineers. The contractor must contact suppliers for prices and negotiate financial

requirements with subcontractors. Throughout the process, he or she must be aware of industry standards, legal liability laws, and local ordinances or regulations.

This process is time-consuming and expensive. Requiring that a contractor undergo it for a bid that the City is required by the law to ignore is the sort of mechanical exercise that this Court has specifically rejected. *Pennell*, 485 U.S. at 7. Nor is such a standard necessary to be sure that the plaintiffs before a court are truly injured. In the context of employment applications, this Court has stated:

> When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

International Broth. of Teamsters v. United States, 431 U.S. 324, 365-66 (1977).

With applications as complicated as bids for construction projects, "a court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261-62 (1977). An ordinance that stands as an "absolute barrier," *id.*, to full participation in a government-sponsored program causes actual injury to all who are subject to the ordinance.

In essence, Respondents' argument is no different from the Eleventh Circuit's rule. Respondents would substitute "specific denied bid" for "specific lost contract" as

the only adequate proof of actual injury. Either standard, however, creates an overly technical requirement that is not consistent with the principles of equal protection or the precedent of this Court.

AGC has shown that AGC members, who regularly bid on and perform contracts for the City, are directly governed by the City's set-aside ordinance. That ordinance requires the City to exclude non-minority contractors from the bidding process for certain projects. That exclusion is an actual, particularized injury sufficient for standing in this case.

C. AGC's Complaint Establishes Imminent Exclusion of AGC Members from the City's Bidding Process.

Respondents argue that AGC failed to establish imminent injury because it did not allege that any AGC member plans to bid on future contracts, or that the City would not waive the set-aside requirements for future projects. Respondents' Brief at pp. 14-15. Neither of these arguments can support the ruling below.

AGC made clear that its members "regularly bid on" City contracts, Complaint, ¶ 9; R-1-1; Joint Appendix at JA-10, and that they face continuing injury from discrimination. *Id.*, ¶¶ 50-52, JA-19-20. Anything but a strained reading of Petitioner's complaint will reveal AGC members' intent to continue to do business with the City of Jacksonville.

Similarly, it is not "unadorned speculation" to conclude that the City will enforce its ordinance against

association members. *Pennell*, 485 U.S. at 8. AGC "does not have to await the consummation of threatened injury to obtain preventive relief." *Com. of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 593 (1923), quoted in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (plaintiffs need not invoke election procedures to challenge constitutionality of those procedures).

Respondents' reliance on its waiver provisions amounts to little more than a claim that the City is free to ignore its ordinance. Respondents cannot seriously claim that all City projects will fall within the waiver provisions. If the ordinance has any effect, the City will set aside contracts for minority businesses. Its impact is speculative only if the City will ignore the ordinance. This Court has consistently rejected such arguments. *See, e.g., Turner v. Fouche*, 396 U.S. 346, 362 n. 23 (1970) ("Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law").

Respondents' argument is nothing more than an attempt to secure affirmance of a decision that cannot be defended on its own terms. Respondents would change the rules one more time in this case and force AGC to meet yet another moving target. They would have this Court apply a standard that neither the district court nor the two panels of the Eleventh Circuit considered, and that in any event is not consistent with the precedent of this Court.

Even if this Court agrees with Respondents' criticisms of AGC's complaint, the proper remedy in this case is not affirmance of the circuit court, but a remand for further evidentiary proceedings. *Havens Realty Corp. v.*

Coleman, 455 U.S. 363, 377-78 (1982); *Gladstone Realtors*, 441 U.S. at 115. Those evidentiary proceedings, however, still would require review of the Eleventh Circuit's decision. The district court would have to know whether to require from AGC evidence of a specific lost contract, as the Eleventh Circuit mandates, or some other evidence.

In sum, the question upon which this Court granted certiorari remains the same – whether a plaintiff must identify a specific lost contract to have standing to challenge a set-aside program for government contracts. As AGC demonstrated in its brief on the merits, and as Respondents and their supporting *amici curiae* do not seriously dispute, the Eleventh Circuit rule is wrong. A plaintiff invoking the equal protection clause need only assert the injuries against which the clause protects. In this case, those injuries are exclusion on the basis of race from a government's bidding process.

AGC's complaint alleges that the City's ordinance reserves 10% of all City projects and contracts for minorities. AGC members routinely bid on and perform City contracts, and therefore are subject to that ordinance. The ordinance excludes non-minority members, on the basis of race, from equal competition for City contracts. These allegations are, and always have been, sufficient to establish injury under the equal protection clause of the United States Constitution. Nothing in the record or Respondents' brief justifies a different rule in this case.

CONCLUSION

For all of the reasons discussed herein and in Petitioner's Brief on the Merits, AGC respectfully requests that this Court reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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